

**Guidelines for  
Tendering**

**Prepared by  
Evans & Peck Pty Limited**

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# 1. INTRODUCTION

The purpose of these Guidelines for Tendering is to provide a framework for the effective, consistent and efficient management of tendering practices throughout the Australian construction industry and associated industries (such as the information technology and telecommunications industries). The principles set out in this document can be equally applied to any industry involving the delivery of a new product or service.

Inherent in these Guidelines is the adoption of ethical principles that underpin best practice tendering procedures. .

Successful projects have generally started with the use of best practice tendering processes, and the benefits of such tendering practice include:

- A clear understanding of the rights and obligations of both parties.
- An increase in the likelihood of procuring a project to meet the required scope, time, cost and quality parameters.
- A reduction in the likelihood of misunderstandings and disputes.

In the application of these Guidelines, a “Client” is defined as a party inviting and receiving tenders, therefore a “Client” may include a contractor or subcontractor. A “Tenderer” is defined as a party submitting a tender. Expectations of responsible behaviour by both the Client and Tenderer are defined in this document.

These Guidelines have been developed so that they are generally consistent with the procedures and ethical principles of:

- Australian Standard (AS 4120 - 1994) *Code of Tendering*.
- New South Wales Government, *Code of Tendering for the Construction Industry (July 1996)*.
- Victorian Government, Office of Building & Development, Department of Infrastructure, *Tendering for Public Construction and Related Consultancy Services (January 1997)*.
- Queensland Government, *State Purchasing Policy (Rev. No. 10; May 1997)*.
- West Australian Government, *Code of Practice for the WA Building & Construction Industry (August 1996)*.

The ACA and its' members are committed to complying with their obligations under the Trade Practices Act 1974 (C<sup>th</sup>) and the corresponding State Acts.

## 2. ETHICAL PRINCIPLES

The ethical principles, including those contained in the NSW Government Code of Tendering for the Construction Industry, which are appropriate as the guiding ethical principles are:

- a) *all aspects of the tendering process must be conducted with honesty and fairness at all levels of the industry*
- b) *parties must conform to all legal obligations*
- c) *parties must clearly identify ownership of intellectual property used or created in the tender process and ensure that those rights are not infringed*
- d) *parties must not seek or submit tenders without a firm intention to proceed*
- e) *parties must not engage in any practice which gives one party an improper advantage over another*
- f) *tenderers must not engage in any form of collusive practice and must be prepared to attest to their probity*
- g) *conditions of tendering must be the same for each tenderer on any particular project*
- h) *clients must clearly specify their requirements in the tender documents and indicate criteria for evaluation*

- i) evaluation of tenders must be based on the conditions of tendering and selection criteria defined in the tender documents*
- j) the confidentiality of all information provided in the course of tendering must be preserved*
- k) any party with a conflict of interest must declare that interest as soon as the conflict is known to that party.*



### 3. TRADE PRACTICES PRINCIPLES

All Tenderers must comply with the *Trade Practices Act 1974* (Cth) ('TPA').

Among other things, the TPA prohibits contracts, arrangements or undertakings:

1. that have the effect or likely effect of substantially lessening competition in a market;
2. between competitors for the purpose of restricting the supply or acquisition of goods or services to or from particular persons or classes of persons, e.g. primary boycotts, bid rigging and market sharing; or
3. that have the effect or likely effect of fixing, controlling or maintaining prices (including discounts, allowances, rebates or credits), to price fixing.

Contracts, arrangements or understandings that fall within paragraphs 2 and 3 above are prohibited, even if they do not actually lessen competition.

Anti-competitive conduct in breach of the TPA has significant legal and financial consequences. It can result in the imposition of fines of up to \$10million per breach for corporations. It may also result in the contravener being ordered to pay compensation to persons who have suffered loss or damage by reason of the contravention. Fines and compensation orders may also be imposed upon any individual such as an employee (Director or officer) who is involved in a company's contravention. It is expected that the Government will soon pass legislation that makes cartel conduct an offence punishable by imprisonment.

An 'arrangement' or 'understanding' does not require a binding agreement and can consist of no more than 'a nod and a wink'. An agreement or understanding

can be inferred from circumstantial evidence such as parallel conduct, joint action, collusion or the existence of opportunities to form an arrangement or understanding, such as meetings with competitors. In a Federal Court decision regarding price fixing of petrol, an understanding was inferred from various meetings and telephone conversations. The Court held that there was 'a consensus as to what was to be done' that aroused expectations as to how others would act.

Tenderers and potential Tenderers must not talk to other Tenderers or potential tenderers (or allow other Tenderers or potential Tenderers to talk to them) about:

1. the price (including any discount, rebate or credit) at which they will supply their services or offer to supply their services in general or in relation to a particular project or class of project;
2. the other terms (eg risk allocation, warranties, performance bonds, tender and bidding procedures etc) on which they will supply their services or offer to supply their services in general or in relation to particular project or class of project;
3. whether they will or will not supply their services to particular persons;
4. the number of Tenderers that will participate in a bid;
5. which tenders they will or will not participate in;
6. the composition of their respective customer bases; or
7. the terms of the bid(s) which any (or all) of them will make in a tender.

This applies to current, future and prospective tenders.

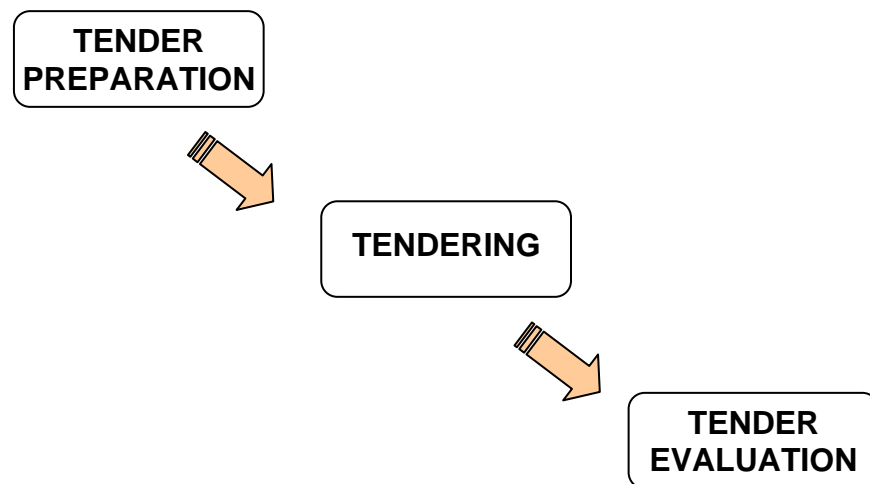
Additionally, Tenderers must not:

- agree as to whom shall be the successful Tenderer or pay each other 'unsuccessful tender' fees;
- provide to any third party any money, incentives or other concessions contingent upon the success of the tender which do not relate to the provision of bona fide services relevant to the object of the tender;
- accept or provide secret commissions;
- submit cover tenders (i.e. tenders submitted as genuine but which have been deliberately priced and structured in order not to win the contract or commission)
- enter into any improper commercial arrangement with any other contractors, subcontractors, suppliers, agents or any other party;
- seek to influence contract decisions by improper means; or
- accept incentives to provide contracts or services to other contractors, subcontractors or suppliers that financially disadvantage Clients.

## 4. TENDER PROCESS

Prior to the commencement of the Tender Process, the Client should choose the most suitable delivery method for the project. The various delivery methods are discussed in Section 5.

Typically, the Tender Process involves three distinct phases:

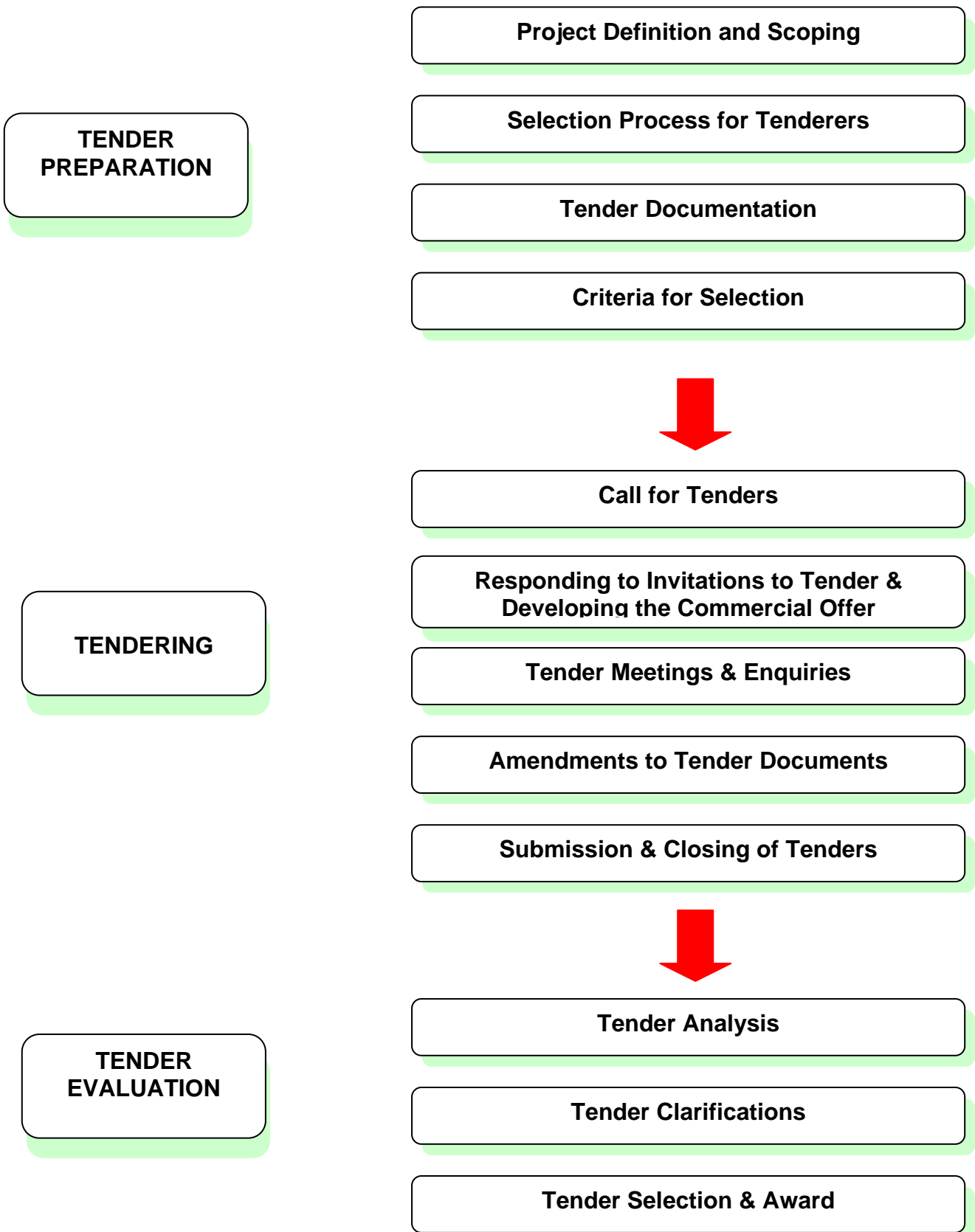


These phases and component activities are shown in Figure 1.

Further details including the obligations of Clients and/or Tenderers in each of the component activities are set out in Sections 6 – 8 of these Guidelines.

Often large, public sector projects, have an Expression of Interest (EOI) process before formal tenders are called in order to select suitably qualified tenderers.

**Figure 1 – The Tender Process**



## 5. PROJECT DELIVERY METHODS

There are a number of methods of delivery of projects, for the purposes of these Guidelines they have been conveniently grouped within six main categories. These categories do not capture all delivery methods such as specific performance type contracts and they are provided as a guide to the types of delivery methods commonly in use.

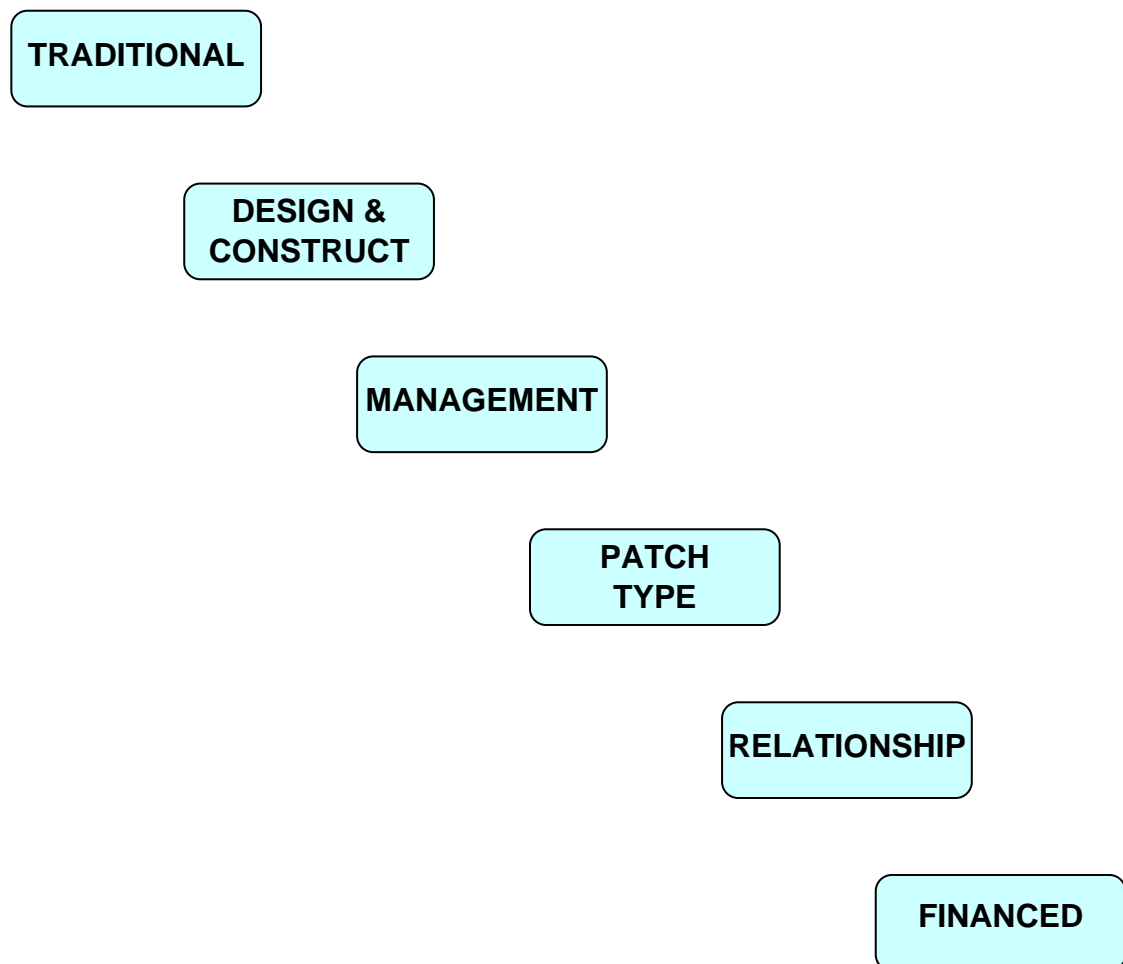


Table 1 provides a brief description and examples of each of these methods.

**Table 1 – Project Delivery Methods**

<b>Delivery Method</b>	<b>Brief Description</b>	<b>Examples</b>
Traditional	The Client engages a designer to design and specify a project and then calls tenders for the construction (or implementation).	Fixed Price Lump Sum; Schedule of Rates; Bill of Quantities.
Design & Construct	The Client contracts to a single entity (company or consortium) that is responsible for both the design and construction (or implementation) of the project.	Design Development & Construct; Design, Novate & Construct; Design & Construct; Engineer, Procure & Construct (EPC); Design, Construct & Maintain.
Management	The Client engages the services of a manager of the construction process but accepts some risk and reward on the cost outcomes.	Construction Management; Engineer, Procure & Construction Mgt. (EPCM); Project Management; Cost Plus; Cost Reimbursable Performance Incentive.
Patch Type (Maintenance and Service)	The Client engages a number of contractors to each carry out capital works and maintenance within defined geographical zones and/ or time periods for specific functions. Contracts vary from Schedule of Rates to performance or outcome based.	Patch Contract; Maintenance Contract including performance based maintenance contracts.
Relationship	This method of procurement attempts to align the goals of the Client and Contractor (and other relevant parties) so that all decisions are made for the benefit of the project.	Alliance Contracting: traditional or competitive/multiple TOC approach
Financed	This method of procurement involves the project being wholly or partly financed by someone other than the Client.	Construction Finance; Private Public Partnership (PPP); Build, Own, Operate (BOO); Build, Own, Transfer (BOT). Build, Own, Operate, Transfer (BOOT).

A brief introduction to the selection of project delivery methods is provided in the Appendix.

## 6. TENDER PREPARATION

The key components of the Tender preparation are

**Project Definition & Scoping**

**Selection Process for Tenderers**

**Tender Documentation**

**Criteria for Selection**

These are dealt with in Sections 6.1 to 6.4





## 6.1 Project Definition & Scoping

The commencement of the tender process is the development of the project definition and scope which will set the scene for the success of the entire process.

In the best interests of the project, it is recommended that the Client ensures that:

- A Project Brief is prepared that clearly defines the scope of the project for which Tender Documents are to be prepared. This document must define all project stakeholder requirements (including envisaged functional goals, performance, technical criteria, completion dates or term date requirements) for the project. Any known constraints associated with the delivery of the contract should be identified upfront, e.g. public access requirements, availability of land, limits to work etc. Failure to include all scoping requirements will most likely result in stakeholder expectations not being met, and could result in disputes at a later date.
- Intellectual property may be an essential component of a Project design or Project delivery system. Therefore the parties should –
  - identify any intellectual property components of its preliminary proposals, and
  - manage any intellectual property issues that arise during Project discussions
- Relevant initial investigations (eg. market research, feasibility studies etc.) are undertaken. These investigations should also insofar as is practical identify the significant (high level) and relevant risks to successful delivery of the project.

- A cost estimate is established based on the scope defined in the Project Brief, which should include the risk allocation. Costs need to be estimated for all resources associated with the project (including, labour, materials and supplies). In this way, the proposed scope may be adjusted in line with budget.
- A time estimate is established based on the scope defined in the Project Brief. This involves the definition, sequencing and duration estimation of individual project activities.
- A cost/benefit exercise is carried out taking into account the initial cost estimate, time estimate and expected costs/revenues over the life of the project. In this way, the financial viability of the proposed project is tested. It is noted that in some cases (eg. some government projects), there may be non-financial benefits that will also support the procurement of the project.
- An appropriate budget is allocated and finance arranged to develop the project.
- Appropriate time is allowed to undertake the above mentioned activities.

## 6.2 Selection Process for Tenderers

There are five main processes for the selection of Tenderers.

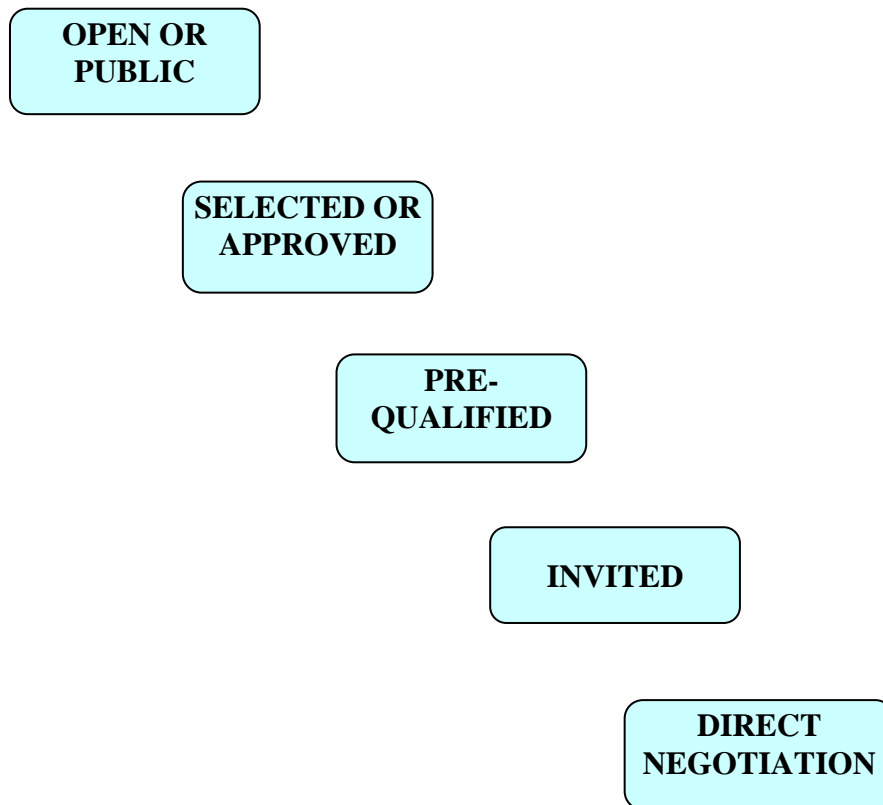


Table 2 provides a brief description of each of these processes.

**Table 2 – Selection Processes**

<b>Selection Process</b>	<b>Brief Description</b>	<b>Examples</b>
Open or Public Tenders	The Client invites tenders by way of public advertisement without restriction on the number of tenders received..	Simple Projects – Low Risk & Low Cost.
Selected or Approved Tenders	The Client invites a select number of Tenderers for a particular project. In some cases, the Client will have an established register of approved contractors for particular types of work. In these cases, Tenderers will have attained a minimum capability/standard to undertake such works. Tenderers are generally invited on a rotational basis. Registration needs to be reviewed and updated on a regular basis.	Repetitive type works regularly carried out by a Client;  “Roll-out” Type Works.
Pre-Qualified Tenders	The Client invites expressions of interest by way of public advertisement for Pre-Qualification for a specific project or specific types of projects.  Evaluation is carried out against the defined Selection Criteria. A selected number of Pre-Qualified Tenderers is then invited to tender.	Complex Projects – High Risk & High Cost.
Invited Tenders	The Client invites tenders from Tenderers who have a recognised capability to undertake the type of project planned.	Specialised Projects.
Direct Negotiation	The Client negotiates with a single Tenderer.	Highly Specialised Projects in which only one entity has the required skill and current capacity to undertake the work.

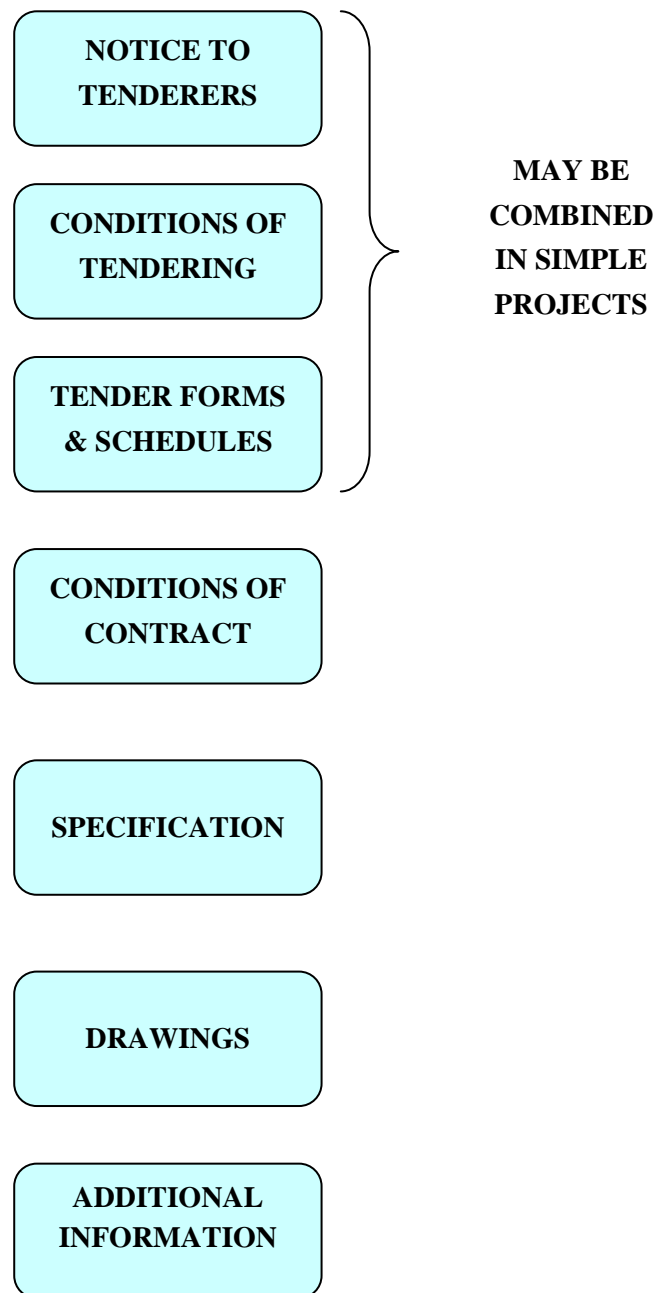
In the case of all Tender Selection Processes, it is recommended that the Client ensures that:

A competitive tender field is established (except, of course, in the case of Direct Negotiation).

- Prospective Tenderers who decline an Invitation to Tender are not discriminated against.
- In the case of Direct Negotiation, the criteria set down by the NSW Government, and in particular the elements listed in Section 8 should be taken into consideration.
- In the case of invitations to submit Expressions of Interest for Pre-qualification, the client should include in the invitation document a set of objective criteria against which the applicant will be assessed.

### 6.3 Tender Documentation

The content of the Tender Documentation will vary for particular projects according to factors such as project size, complexity and delivery method. Nevertheless, the following key documents will generally be required as a minimum.



### Table 3 – Tender Documents

Table 3 provides a brief description of each of these documents.

Document Type	Brief Description
Notice to Tenderers	This document contains a Project Summary, a listing of Tender Documents, key dates, validity period, contact details, number of copies required and details of tender submission location and timing.
Conditions of Tendering	This document details the overall Tender Process including the Delivery Method, Probity issues, Communication issues, the Criteria for Selection and the Evaluation Process. The Criteria for Selection is dealt with separately in Section 5.4.
Tender Form & Schedules	These documents request specific information from the Tenderers concerning the works. For example, Tenders are generally required to provide an overall cost, a breakdown of this cost, a program, details of manpower, plant and equipment, personnel, subcontractors and methodologies. The Tender Form is a formal statement of the Tenderer's offer to supply services in accordance with the Tender Documents.
Conditions of Contract	This document contains the General Conditions of Contract which sets out the contractual basis for carrying out the works. In addition, the Special Conditions are sometimes included which are unique to the client and/or project.
Specification	Depending on the type of Delivery Method chosen, this document may be a Project Brief or a detailed Specification of the works. These documents set out the performance and technical criteria for the project.
Drawings	The number and standard of drawings provided is dependent on the chosen Delivery Method.
Additional Information	Additional information concerning the project may include Environmental Impact Study (EIS) Reports, EIS Working Papers and other documents relevant to the development of the project.

With respect to the procedural issues, it is recommended that:

- Due regard is given to the costs of tendering to both the industry and the community. The use of pre-qualification and/or EOI processes are methods for ensuring this occurs. The time allowed for Tenderers to prepare tenders and for the Client to evaluate and select tenders is reasonable. The following table should be used as a general guide only as to the recommended periods for these activities in order that they can be professionally and competently carried out. Times will of course vary depending on factors such as project size, complexity and political sensitivity.

<b>Delivery Method</b>	<b>Recommended Period For Tender Preparation (by Tenderers)</b>	<b>Recommended Period For Tender Evaluation &amp; Selection (by Client)</b>
Traditional	2 – 4 weeks	1 – 2 weeks
Design & Construct	6 – 26 weeks	4 – 20 weeks
Management	3 – 4 weeks	2 – 4 weeks
Patch Type	4 – 8 weeks	4 – 6 weeks
Relationship	2 – 4 weeks	2 – 4 weeks
Financed	16 – 26 weeks	12 – 20 weeks

- The time allowed for construction (or implementation) is reasonable.
- In the preparation of the Tender Documents, it is recommended that the Client ensures that: The level of Tender Documentation is commensurate with the chosen Delivery Method.



- The Tender Documents provide full details of all work to be covered by the tender and all known information for the Tenderers to assess the project risks.
- The Tender Documents are drafted in a clear and concise manner without unnecessary repetition and terms and phrases used throughout the documents should have consistent meanings.
- The Tender Documents should include copies of any Client procedures, standards or guidelines that the Tenderer is required to comply with.
- The Tender Documents do not contain any poorly worded or ambiguous statements that may lead to prolonged disputes during construction (or implementation).
- The Tender Documents state whether the Client will be providing an “in house” tender price as part of the tender process. In particular, public companies need to have regard to the requirements of the Corporations Law in relation to this practice.
- The Tender Documents clearly state the communication protocols such as the documents which should or may be submitted in electronic form. They should also state the Client Contact person responsible for dealing with issues arising from the tender and for arranging site visits and inspections. This person needs to be fully familiar with all tender documentation and readily available for answering enquiries during the tender period. It is recommended that this person is also experienced in contractual matters and probity requirements.
- The Tender Documents clearly state the number of copies of the tenders required.

- The Tender Documents clearly state the method and time of lodgement of tenders, acknowledgement of Tenderer submissions and the tender validity period.
- The Tender Documents clearly state the Criteria for Selection, including reference to certain criteria that the Client considers are most important, the Evaluation Process and Selection Process.
- The Tender Documents contain a returnable covering sheet highlighting all main sections of the documents so that Tenderers can formally acknowledge its receipt in writing. These covering sheets should be returned by the Tenderers within 3 business days of receipt.
- The Tender Documents clearly specify the contractual obligations of the parties with appropriate allocation of risks. For guidance it is suggested that risk be generally allocated to the party where that risk is within the party's control to manage.
- The Tender Documents clearly identify Special Conditions of Contract that are unique to the Client or project. This is particularly important if these conditions depart from a Client's normal practice.
- Any special Conditions of Contract stipulated by third parties as part of an environmental approval process should be specified (i.e. or part of an environmental impact approval or development application process).
- The Tender Documents clearly specify any arrangement for the novation of agreements from the client and include the relevant agreements, subject to normal confidentiality requirements, in the Tender Documentation.

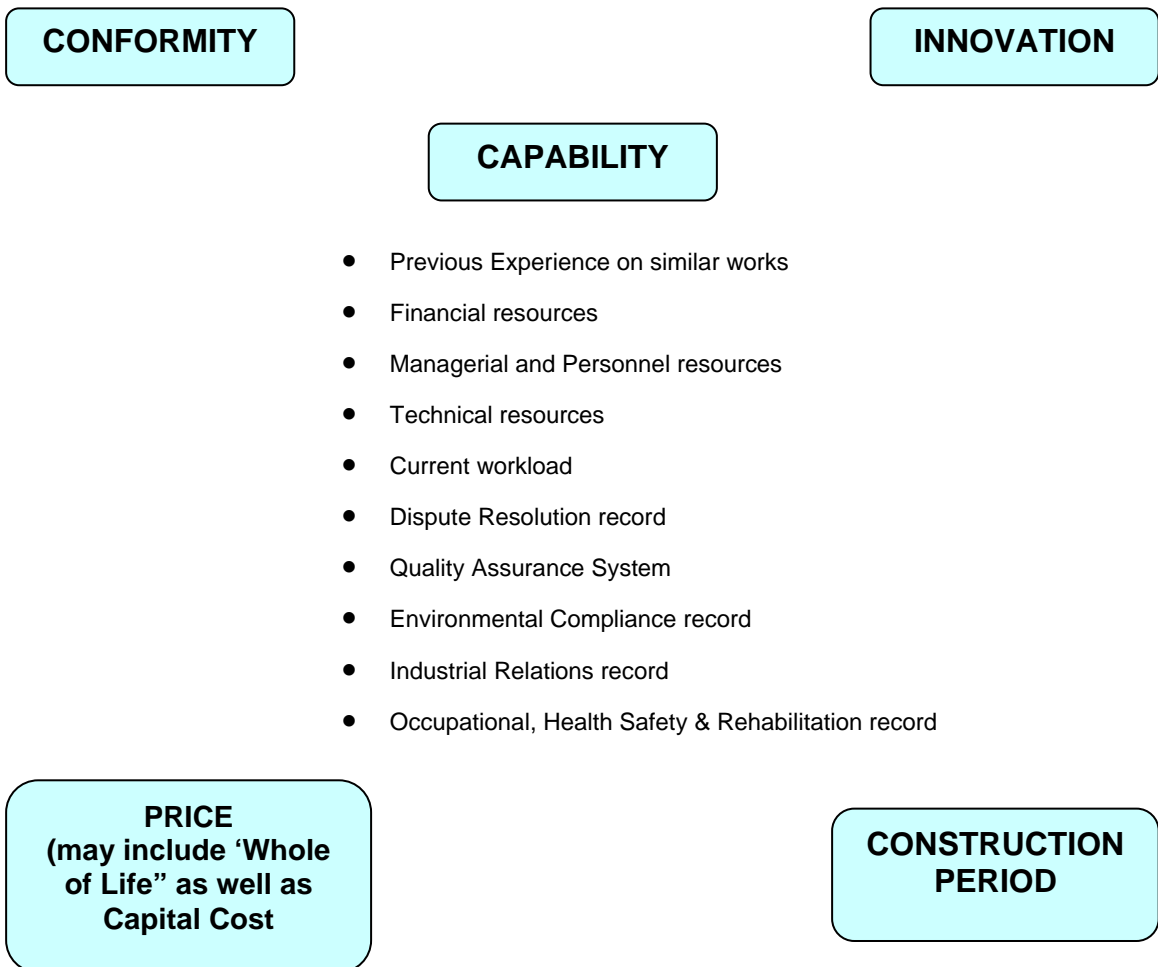
- The Tender Documents should also clearly specify that documents are required to be completed and lodged as the Tender, and these should normally be described as the Tender Form & Schedules as indicated in Table 3.

While not a prerequisite, it may be appropriate that the Tender Documents provide an opportunity for Tenderers to offer alternate tenders, provided that a conforming Tender is also provided. The conditions under which alternative proposals are to be submitted are to be clearly stated. The alternative may involve some innovation and may result in better “value for money” for the Client.

In regard to confidentiality obligations described in the Tender Documents, these should not be such that they unreasonably constrain the Tenderer from taking the steps required to prepare its tender, such as consulting with third party legal, financial and technical advisers and with prospective partners and subcontractors.

## 6.4 Criteria for Selection

The Criteria for Selection must be clearly stated in the Tender Documents. Such criteria need to cover the critical factors on which the success of the project is based. Typical Criteria for Selection include:



- Previous Experience on similar works
- Financial resources
- Managerial and Personnel resources
- Technical resources
- Current workload
- Dispute Resolution record
- Quality Assurance System
- Environmental Compliance record
- Industrial Relations record
- Occupational, Health Safety & Rehabilitation record

Hence, the Criteria for Selection involve both a "Price" and "Non-Price" components. Depending on the nature of the Client and project, each of the above factors will have a varying weighting or priority. It is recommended that the Client ensures that the Criteria for Selection weightings are determined prior to the opening and evaluation of tenders. It is preferable that the weightings are not disclosed to Tenderers.

## 7. TENDERING

The key components of Tendering are:

**Call for Tenders**

**Responding to Invitations to Tender &  
Developing the Commercial Offer**

**Tender Meetings & Enquiries**

**Amendments to Tender Documents**

**Submission & Closing of Tenders**

These are dealt with in Sections 7.1 to 7.5



## 7.1 Call for Tenders

In the case of tenders called by public advertisement, advertisements shall be placed in appropriate newspapers or publications at appropriate times so as to attract suitable applicants. Some newspapers select particular days to highlight public tenders and this practice shall be supported.

In cases where tenders are advertised, it is recommended that the advertisement includes the following:

- An appropriate summary description of the work required.
- Details of when and where Tender Documents may be obtained.
- Details of when and where tenders shall close.
- Details of any Tender Documentation purchase price or deposit and, if applicable, the method of obtaining a refund of that cost.
- The name, address, telephone number, facsimile number and email address of the Client's Contact person.

With respect to procedural issues, it is recommended that the Client ensures that:

- A written record is kept of all persons to whom the Tender Documents are issued. It is also recommended that each tender set be numbered for identification and tracking purposes.
- In the case of Selected, Pre-Qualified and Invited Tenders, the Tenderers are informed of the number of tenders being invited where that number exceeds 3.

## 7.2 Responding to Invitations to Tender & Developing the Commercial Offer

It is recommended that Tenderers ensure that:

- Tenders are only submitted if Tenderers genuinely believe that they have the capability and resources to undertake the work being tendered.
- Tenderers that may have a conflict of interest (at a personal or company level) must declare that interest as soon as the conflict is known to allow appropriate assessment and resolution by the Client and it's Probity Auditor (if appointed).
- In the case of Selected or Invited Tenders in which a Tenderer decides not to proceed with the Tender, the Tenderer promptly advises the Client. It is noted that in the case of Pre-Qualified Tenders, Tenderers should be required to provide an undertaking to tender if selected.

With respect to procedural issues, it is recommended that Tenderers ensure that:

- The returnable covering sheet highlighting all main sections of the documents is completed and returned to the Client within 3 business days of receipt of the Tender Documents. In this way, Tenderers formally acknowledge its receipt in writing.
- They promptly advise the Client of errors, omissions, ambiguities or discrepancies in the Tender Documents of which they become aware.

- If they are in doubt about any issue, the Tenderers obtain clarification from the Client, so that a full understanding of the project is obtained.
- The tenders conform to all aspects of the requirements defined in the Tender Documents.

Finally, it is mandatory that Tenderers do not engage in any uncompetitive behaviour including, but not limited to the following:

- Agreement between Tenderers as to whom shall be the successful Tenderer and the payment of unsuccessful tender fees.
- Payment to any third party of moneys, incentives or other concessions contingent upon the success of the tender, which do not relate to the provision of bona fide services relevant to the object of the tender.
- Acceptance or provision of secret commissions.
- Submission of cover tenders (ie., tenders submitted as genuine but which have been deliberately priced and structured in order not to win the contract or commission).
- Entering of any improper commercial arrangements with any other contractors, subcontractors, suppliers, agents or any other party.
- Seeking to influence contract decisions by improper means.
- Acceptance of incentives to provide contracts or services to other contractors, subcontractors or suppliers that financially disadvantage the Client.



### 7.3 Tender Meetings & Enquiries

It is recommended that all information provided between the parties is treated as confidential and commercial in confidence. In addition, the Client should ensure that:

- All Briefing Meetings held for Tenderers are minuted. Minutes are then forwarded to all Tenderers and are included as part of the Tender Documentation.
- The Client Contact person, responsible for dealing with enquiries from Tenderers, is to document all such inquiries, noting the time, the date and the issue discussed.
- Information provided to one Tenderer is also promptly given to all other Tenderers. It is however noted that in the case of certain tenders (eg. Design & Construct, BOO, BOOT Schemes etc.), particular issues arise where Tenderers may request information that relates to their specific design solution. These issues need to be carefully addressed with respect to probity. Resolution of matters specific to any particular Tenderer's scheme should be by one to one written communication.
- In the case where an enquiry reveals a significant error, omission, ambiguity or discrepancy in the Tender Documents, the information provided to resolve the issue is promptly forwarded in writing to all Tenderers.
- In the case of large, complex and politically sensitive projects, it may be appropriate to appoint an independent Probity Auditor to

warrant that the tender process is fair and equitable. The Probity Auditor carries out this role by:

- Monitoring communications between the “Call for Tenders” and the “Tender Selection”.
- Attending Tender Meetings and Tender Evaluation Team Meetings (as appropriate).
- Providing advice with respect to the handling of particular probity issues.

## **7.4 Amendments to Tender Documents**

With respect to amendments to Tender Documents, the Client should ensure that:

- Such amendments are avoided or minimised. A proper structured review of the Tender Documents prior to issue will support this outcome. It is preferable to delay the Call for Tenders than to issue documentation that has not been thoroughly checked and will need to be amended.
- However, where significant issues arise that make it necessary to amend the Tender Documents during the tender period, the amendments are to be advised as an Addendum forwarded to all Tenderers.
- Each Addendum is issued in sufficient time for all Tenderers to consider the amendments properly and fully before tenders close. It may be appropriate to extend the tender period, particularly if the Addendum is issued late in the tender period.
- Each Addendum contains a returnable covering sheet so that Tenderers can acknowledge its receipt in writing. A statement of

confirmation that allowance has been made for each Addendum is required in the submission of the tenders.

Tenderers should ensure that:

- The receipt of each Addendum is acknowledged in writing.
- A statement of confirmation is included in their tenders that allowance has been made for each Addendum.

## **7.5 Submission & Closing of Tenders**

It is recommended that the Client ensures that:

- The security and confidentiality of all tenders is achieved following the closing of tenders. Procedures for the security of documents, access to documents and the availability of price sensitive information are to be developed in advance of the closing of tenders.
- Tenders are generally received in a secure Tender Box and opened in the presence of specially qualified team (not less than 2 people). Alternative arrangements may be required in the case of large projects which involve extensive documentation. In the case of minor works, if a secure Tender Box is not used, security stickers should be placed on the envelope seals. Some organisations are encouraging electronic transfer of tender documents and tenders.
- Each document is registered and it is good practice to summarise the key information from each tender as soon as possible. One copy of each of the tenders (the Original) needs to be separately

stored in a secure location from working copies for reference purposes.

- The timing of the closing of tenders is:
  - Not earlier than 2.00 pm.
  - Not on a Monday or day following a Public Holiday.
  - At least one week after the recognised industry Christmas close down.
  
- Each Tenderer is informed in writing that its tender has been received.
  
- No information provided in a tender by a Tenderer is disclosed by the Client to another Tenderer at any stage during the tender process or after it has concluded. However, it is acceptable to have public openings of tenders and disclosure of tender prices, or the rank order of tenders provided it is advised in advance in the Tender Documents.
  
- For large public sector projects, particularly PPP's, contract documents for the winning bid or contract summaries may be tabled in Parliament. Tender documents should outline any potential public disclosure of the tender bids or contracts.
  
- In the event that the client is prepared to consider late tenders and non conforming offers, then the condition of the tender should describe how the client will treat late tenders and non-conforming or alternative offers.

## 8. TENDER EVALUATION

The key components of the Tender evaluation are:

**Tender Analysis**

**Tender Clarifications**

**Tender Selection & Award**

These are dealt with in Sections 8.1 to 8.3



## 8.1 Tender Analysis

The importance of assembling an experienced and competent Tender Evaluation Team is critical to the success of the tender process. Above all, a consistent approach to the evaluation of all tenders is required.

The Team Leader or Chairperson should possess leadership, communication and negotiating skills as well as technical and commercial capabilities. One of the most important skills is the ability to maintain critical objectivity during the tender process. Each member of the team must be free of any conflict of interest that might undermine the objectivity of the assessment. The appointment of such a team will ensure that the most appropriate Tenderer is chosen with respect to the defined Criteria of Selection.

In most cases, the creation of a Tender Evaluation Spreadsheet which compares each Tenderer's relative compliance is recommended. This spreadsheet should list both the mandatory and desirable requirements under the Criteria for Selection, and provide a clear comparison of the conformities and deficiencies of each tender. The Spreadsheet should also be set up for ranking (with pre-set weightings) by the Evaluation Team.

In major projects (particularly those which involve design and "Whole of Life" assessment, eg. Design, Construct & Maintain and BOOT Projects), each tender is likely to contain differences in the areas of design, timing, capital cost, impact, service and durability, and operating cost. Hence, a rigorous tender analysis process is required to obtain a fair comparison between individual tenders.

The use of Risk Analysis techniques in the tender analysis process is encouraged. In addition, the inclusion of a "Non-Price" Assessment is another method of ensuring that all factors (and not simply cost) are taken into account.

In such cases, segregation of the Tender Evaluation Team needs to be considered. Segregation will help ensure that design solutions from one Tenderer are not transferred to another. If appropriate, the Client may appoint an independent Probity Auditor to oversee and advise on such issues.

It is recommended that the Client ensures that:

- Tenders are analysed against the Criteria for Selection defined in the Tender Documents.
- A tender that does not comply with the Tender Documents is rejected. If a tender is rejected, the reasons for such action are to be clearly documented and communicated to the tenderer.
- In the case of the submission of an alternative proposal by a Tenderer, The intellectual property of the Tenderer offering the alternate proposal must be protected. However, tenderers need to be made aware that some jurisdictions (e.g NSW) Parliament has the power to access and in some cases publicly display tender documents which may contain intellectual property or other commercially in-confidence material.

## **8.2 Tender Clarifications**

The tender clarifications need to be very carefully managed to ensure that confidentiality is maintained and Tenderers are treated equitably and ethically.

Hence, an essential component of the evaluation process for the Client is to identify:

- stated and implied conditions in the tenders; and
- elements of the proposals that are unclear or subject to misinterpretation.

Clarification from the Tenderers for such elements will be required so that tenders are well defined and can be properly evaluated.

It is recommended that the Client ensures that:

- Tender clarification requests and responses to such requests are in writing.
- All meetings with individual Tenderers are minuted. In the case of large and complex tenders, the use of a tape-recorder or video camera may be required.
- If the Tender Evaluation Team decides not to accept any tender and to re-call tenders, the original Tenderers are to be advised of the reasons for re-calling and, as a general principle where appropriate, invited to submit a new tender.
- If a previous tender condition which prevented a Tenderer from submitting a tender is removed, that Tenderer is allowed to submit a new tender when re-called.

It may be possible to stage the tender clarification process so that the field is reduced to 2 Tenderers.

Tenderers should ensure that:

- When requested to submit responses to clarifications by the Client, such information is provided in a complete form and lodged by the time and date nominated. If the Tenderer



anticipates a problem with producing a response by the time and date nominated, it will inform the Client promptly.

- Appropriate personnel are available to attend meetings with the Client following reasonable notice.

### **8.3 Tender Selection & Award**

It is recommended that the Client ensures that:

- The Tender Evaluation Team produces a Tender Evaluation Report which summaries the methodology undertaken and final recommendations. The reasons for selection should be clearly stated and well substantiated. This report is produced for the Client's internal approval process.
- Unsuccessful Tenderers are advised in writing that their tenders have been unsuccessful. In such cases, it is also appropriate that a debriefing be held. The debriefing is to examine how the tender performed against the Criteria for Selection with the objective of enhancing future performance.
- Unsuccessful Tenderers return their Tender Documents, provided Tenderers are informed of this requirement prior to receiving the documents.

In the finalisation of the Contract Documentation, the Client and Successful Tenderer shall ensure that the Contract incorporates the tender submission of the Successful Tenderer and any qualifications during the tender process. It is noted that this phase of the process is to settle all outstanding technical, commercial and/or legal issues necessary for finalisation of the contract. It is not an opportunity for either party to vary the final contract price or to materially alter the proposal.

## 9. RELATIONSHIP CONTRACTING

The key components of Relationship or Alliance Contracting are:

**General Criteria**

**Principles of an Alliance**

**Compensation Framework**

**Alliance Procurement Process**

These are dealt with in Sections 9.1 to 9.4.



## 9. Relationship Contracting

An alternative form of procurement of traditional contracts through a tender process is relationship contracting, often referred to as alliance contracting.

### 9.1 General Criteria

An alliance brings the owner, designer and constructor together into a single entity – an alliance – for the purposes of delivering a major capital works project, usually characterised by complexity and high risk. Project alliances are best suited to those projects where the traditional risk transfer strategies are not appropriate.

The main purpose of an alliance contract is to:

- Promote innovation
- Increase co-operation between the parties
- Reduce disputation
- Share the benefits or costs that might affect any of the parties during the project
- Pool significant risk

Project alliances were first used in Australia to deliver oil and gas projects in Western Australia in the early 1990's. Since that time their application in the public sector has increased in most jurisdictions, for example: Sydney Water's Northside Storage Tunnel, RTA's Lawrence Hargrave Drive (Sea Cliff Bridge),

the National Museum in Canberra, and various road projects in Queensland. Alliance contracts also have been used to deliver: wastewater infrastructure; electricity generation and distribution; water supply and port infrastructure.

Alliance contracts are an appropriate procurement method when:

- The project risks are difficult to quantify, e.g. project involves extensive utility adjustments which are poorly documented or ground conditions/geo-technical risks are not adequately quantified at the start of the project
- Project design requires innovation, is complex and evolves as the project is developed
- The number of interfaces with other parties is significant and cannot be sufficiently scoped at the commencement of the project
- Time is of the essence with critical time milestones to be met that do not permit the project to be sufficiently specified prior to the commencement of the project.

## 9.2 Principles of an Alliance

Project alliances are based on a set of generic principles for which all participants must be fully committed. The key principles are:

- Performance obligations are collective not individual
- Risks are shared and managed collectively rather than allocated to individual parties considered best able to manage them

- A commitment to resolve issues within the alliance without recourse to litigation except in the case of “wilful default”
- All transactions by all parties are open book and subject to audit
- Project is governed by a leadership team with representatives from all parties who carry full authority to bind the party they represent, with all decisions by the team unanimous
- Project is managed by an integrated project management team, where members are assigned to the team on a “best for project” basis
- Participants are committed to developing a culture that promotes innovation and a no blame/fault ethos
- Reimbursement to the alliance partners (apart from the owner) is a 3-part compensation model.

### 9.3 Compensation Framework

The owner and the non-owner participants (NOP) develop and scope the project jointly and agree a commercial framework which includes a target cost and a suitable fee for performance targets.

The commercial framework should be designed so as to align the commercial interests of the parties and encourage collaborative behaviour.

Once the target cost and performance targets are locked in, reimbursement to the NOP's is via a 3-part compensation model as follows:

1. all direct actual costs incurred on the project, including project-specific overheads

2. a fee to cover corporate overheads and normal profit
3. a performance based gain/pain sharing arrangement depending on how actual outcomes compare with pre-agreed targets (in both cost and non-cost performance areas)

The downside risk for the NOP's is generally capped so that each NOP can lose its fee which is equivalent to its margin for corporate overheads and normal profit but no more. The pain/gain arrangements should be designed to ensure that the NOP's assume an equitable share of the pain/gain, along with the owner.

#### **9.4 Alliance Procurement Process**

The process for procuring suitable Alliance partners will vary for particular projects and clients according to a variety of factors such as client objectives, market conditions, complexity of scope and program requirements.

Notwithstanding the above, the following steps are generally required during the procurement process for suitable alliance partners.

<p><b>Call for Expression of Interest (EOI)</b></p>	<ul style="list-style-type: none"> <li>+ Developed by the Client</li> <li>+ Outlines Project Objectives</li> <li>+ Describes expected procurement process and timetable</li> <li>+ May request specific commercial information</li> </ul>
<p><b>Response to EOI from Market</b></p>	<ul style="list-style-type: none"> <li>+ Generally short response time (4 weeks)</li> <li>+ By Alliance Teams (proponents)</li> <li>+ Describes their approach to the Alliance and meeting project objectives</li> <li>+ Describes proponents expertise, track record and proposed staffing</li> <li>+ Responds to all requests in EOI</li> </ul>
<p><b>Selection of Short Listed Alliance Proponents</b></p>	<ul style="list-style-type: none"> <li>+ Generally based on written submissions and interviews (1/2 day)</li> <li>+ Client uses Selection Panel, Probity Advisor retained in some cases.</li> </ul>
<p><b>Conduct Selection Workshops with short Listed Proponents</b></p>	<ul style="list-style-type: none"> <li>+ Generally 2 day workshops</li> <li>+ Discuss approach to principles and objectives of Alliance</li> <li>+ Discuss commercial principles</li> <li>+ Commitment to outstanding performance and alignment of goals</li> </ul>
<p><b>Select Preferred Proponent(s)</b></p>	<ul style="list-style-type: none"> <li>+ Generally by use of a Selection Panel</li> </ul>
<p><b>Develop and Agree Commercial Framework</b></p>	<ul style="list-style-type: none"> <li>+ Can take a reasonable period of time</li> <li>+ Confirm Scope of Work to be performed by the Alliance</li> <li>+ Develop &amp; agree Target Cost Estimate and Fee</li> <li>+ Develop KRA/KPI Arrangements</li> <li>+ Agree on Commercial Framework</li> <li>+ Agree on Program goals</li> </ul>
<p><b>Execute Project Alliance Agreement</b></p>	

## 10. DIRECT NEGOTIATION

The key components of Direct Negotiation are:

**General Criteria**

**Negotiation Process**

These are dealt with in Sections 10.1 and 10.2





## 10.1 General Criteria

In general terms, a Government client may consider undertaking direct negotiations in the following circumstances:

- When the value of the goods or services is low relative to the cost of conducting a competitive process;
- When an appropriate competitive process has not produced a good enough offer and the better option in the circumstances is to negotiate with the party who made the best offer or any party who has expressed serious interest if no best offer was made;
- When it is clear beyond doubt that there is only one supplier or buyer who can meet the organisations well defined and justified needs;
- Where there is an unforeseen need to alter the scope of the Project in a minor way and the cost of re-tendering will outweigh the potential benefits; or
- When the disposal of property assets leads to significant economic development for the State or Local Government, where 'because of extenuating circumstances, remoteness or locality or unavailability of competitive or reliable tenderers, that a satisfactory result would not be achieved by inviting tenders' – NSW Local Gov. Act Section 55(3).

## 10.2 Negotiation Process

If circumstances described in 10.1 arise, then direct negotiations may be appropriate. In this event the parties should –

- Ensure that the parties involved in the direct negotiation process have the required levels of authority, training and experience;
- Seek advice from the appropriate agency on whether direct negotiations are an appropriate course of action;
- Ensure that the decision of the Government client to negotiate directly has been approved by the relevant regulatory authority or Government client CEO;
- If the negotiations relate to a large contract, ascertain if Ministerial approval is required and, if so, obtain it;
- Ensure that all decisions and reasons for decisions are clearly documented;
- Ensure, where possible, that the Government Client's reasons for not proceeding with a competitive tender process be documented so as to enable the Government client or the appropriate Minister to explain why private negotiations were entered into in favour of a tender process;
- Ensure that potential conflicts of interest are disclosed early in the negotiation process and, in any event, immediately they are identified;
- In complex negotiations a formal negotiating protocol should be adopted and accepted by the parties to the negotiations. The protocol should cover

- such issues as regular meetings, written exchanges, document exchanges, dealing with urgent issues, 'critical' issues meetings, recording meetings, and roles and responsibilities of members of the respective negotiating teams; and
- Involve expert technical advisers and legal advisers at the appropriate times.

## **APPENDIX - PROJECT DELIVERY METHOD SELECTION**



## PROJECT DELIVERY METHOD SELECTION

Further to the discussion on the various project delivery methods, this Appendix provides a brief introduction to the selection of particular methods.

### Risk Profile

Each project will have its own specific risk profile. Major risk areas are usually described in accordance with the following headings which can be used in assisting the selection of the most appropriate delivery method:

- Completion Risk – the risk that the project will not be completed, or will be completed sufficiently late to affect the viability of the project.
- Construction Cost Risk – the risk that the project budget will be exceeded.
- Environmental Risk – the risk that the project will be sensitive to environmental and/or heritage issues, and/or environmental conditions of approval.
- Industrial Relations Risk – the risk that the project will be affected by industrial relations concerns.
- Technological Risk – the risk that the project will be sensitive to the application of new technologies.
- Operational Risk – the risk that the facility will not operate within the design specification.

- Market Risk – the risk that sufficient cashflow will not be generated by the completed facility.
- Political Risk – the risk that a change in government or in taxation legislation will affect the return on investment.

## Suitability Matrix – Project Delivery Methods

Clients and Tenderers are best served when the project delivery method best suits the overall project requirements.

As an initial step to assist the Client in the selection of the most appropriate project delivery method, the risk profile should be examined for the particular project which is intended to be put to the market to tender.

A typical worked example of such an analysis using the risk headings previously identified is indicated below. This methodology has been derived from the ACA “Relationship Contracting” Publication (1999).

The **Weighting** is a measure (as a percentage) of the importance placed on a particular risk by the Client.

The **Rating** is an assessment of the Likely Risk Outcome, in terms of both Likelihood of Occurrence and Expected Consequence. In this example, there are 5 levels of Rating – from 1 (Low) to 5 (High).

The **Score** is the product (multiplication) of the Weighting of each particular type of risk and the Rating of that same risk.

[ For instance, in this example, the Completion risk is considered to have a Weighting of 15% and a Rating of 4, resulting in a Score of  $0.15 \times 4 = 0.60$  ].

The total Score is the addition of the individual Scores for each type of risk considered.

It is noted that this methodology should be used as a general guide only. Each project will have particular characteristics that will play a role in the approach taken with respect to risk sharing and the final determination of the most applicable delivery method.

Type of Risk	Weighting	Rating				
		1	2	3	4	5
Completion	15%				0.6	
Construction Cost	20%				0.8	
Environmental	10%		0.2			
Industrial Relations	10%		0.2			
Technological	5%		0.1			
Operational	10%			0.3		
Market	15%				0.6	
Political	15%			0.45		
<b>Totals</b>	100%	0.0	0.5	0.75	2	0.0
<b>Total Score = 3.25*</b>						

\* Sum of Individual (Weighting x Rating)

As a guide to the Client in the initial selection of an appropriate project delivery method, the total score should be considered by reference to the “Suitability Matrix” as indicated below:

**SELECTION BAROMETER**

